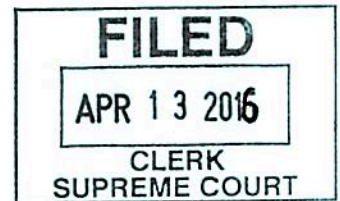


COMMONWEALTH OF KENTUCKY  
KENTUCKY SUPREME COURT  
FILE NO. 2015-SC-000021-DG



COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT  
HON. EDDIE C. LOVELACE  
INDICTMENT NO. 10-CR-00118

RITA MITCHELL

APPELLEE

**BRIEF FOR APPELLEE, RITA MITCHELL**

Submitted by:

ROY A. DURHAM  
ASSISTANT PUBLIC ADVOCATE  
DEPT. OF PUBLIC ADVOCACY  
5 MILL CREEK PARK, SECTION 100  
FRANKFORT, KENTUCKY 40601  
(502) 564-8006

COUNSEL FOR APPELLANT

**CERTIFICATE REQUIRED BY CR 76.12(6):**

The undersigned does certify that copies of this Appellee Brief were mailed, first class postage prepaid, to the Hon. David L. Williams, Judge, Justice Center, 112 Court House Square, P.O. Box 660, Burkesville, Kentucky 42717-0660; the Hon. Jesse M. Stockton, Commonwealth Attorney, 201 N. Cross Street, P.O. Box 175, Albany, Kentucky 42602-0175; the Hon. Kristy Vick-Stratton, Assistant Public Advocate, Warren County Justice Center, 1001 Center Street, Suite 301, Bowling Green, Kentucky 42101; and served by messenger mail to Hon. Andy Beshear, Attorney General, and Hon Leilani K.M. Martin, Assistant Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on April 13, 2016. The record on appeal has been returned to the clerk of the Kentucky Supreme Court on this date.

  
\_\_\_\_\_  
ROY A. DURHAM

## **INTRODUCTION**

Appellee, Rita Mitchell, directly appealed from the judgment of the Monroe Circuit Court, which convicted her of Assault in the First Degree and Criminal Abuse in the Second Degree for which she was sentenced to twelve (12) years and five (5) years respectively to run consecutively for a total sentence of seventeen (17) years. The Court of Appeals unanimously found that the trial erred by failing to grant a directed verdict as to the charge of Assault in the First Degree because Mitchell did not possess a legal duty to care for K.B., and correctly reversed the judgment. This Court granted the Commonwealth's motion for discretionary review to Appellant's questions as to whether Rita Mitchell had a legal duty to K.B. and if the Court of Appeals Opinion was inconsistent when it reversed the Assault in the First Degree conviction and affirmed the Criminal Abuse in the Second Degree conviction.

## **STATEMENT CONCERNING ORAL ARGUMENT**

Appellee welcomes oral argument if this Court believes it would assist in rendering a fair and just opinion in this case.

## **STATEMENT REGARDING CITATIONS**

The record on appeal in this case includes two (2) volumes of record, one (1) video tape and one (1) compact disc. For purposes of this brief, citations to the record are made using the following formats: "TR, p. \_" for citations to the transcript of record and "VT: date; time" for citations to video tape record and "CD: date; time" for citations to the compact disc record.

## STATEMENT OF POINTS AND AUTHORITIES

<b><u>INTRODUCTION</u></b> .....	i
<b><u>STATEMENT CONCERNING ORAL ARGUMENT</u></b> .....	i
<b><u>STATEMENT REGARDING CITATIONS</u></b> .....	i
<b><u>STATEMENT OF POINTS AND AUTHORITIES</u></b> .....	i-iii
<b><u>COUNTERSTATEMENT OF THE CASE</u></b> .....	1-10
<b>ARGUMENTS</b> .....	11-17
<b>I. THE KENTUCKY COURT OF APPEALS CORRECTLY HELD THAT APPELLANT, RITA MITCHELL, DID NOT POSSESS A LEGAL DUTY TO CARE FOR K.B.</b> .....	11-16
<b>A. Appellant’s argument on preservation is waived; however, the issue of duty was properly preserved for appellate review</b> .....	11-12
<b>B. Rita Mitchell did not owe a duty to K.B.</b> .....	12-16
KRS 501.030 .....	12, 13
KRS 501.0505 .....	12
Kentucky Crime Commission/Legislative Research Council Commentary to KRS 501.030 .....	12
<i>West v. Commonwealth</i> , 935 S.W.2d 315 (Ky.App.1996) .....	10, 13
KRS 209.020(6) .....	14
<i>Staples v. Commonwealth</i> , 454 S.W.3d 803 (Ky. 2014) .....	14
<b><u>Conclusion</u></b> .....	16
5 <sup>th</sup> Amendment to the United States Constitution .....	16
14 <sup>th</sup> Amendment to the United States Constitution .....	16
§ 2 of the Kentucky Constitution .....	16
§ 11 of the Kentucky Constitution .....	16

<b>II. THE COURT OF APPEALS WAS INCONSISTENT WHEN IT ONLY REVERSED ON APPELLEE’S CONVICTION FOR ASSAULT IN THE FIRST DEGREE. ....</b>	<b>16-17</b>
<b><u>Conclusion</u> .....</b>	<b>17</b>

## COUNTERSTATEMENT OF THE CASE

Rita Mitchell was indicted by a Monroe County grand jury on the charges of Assault in the First Degree and Criminal Abuse in the First Degree on December 15, 2010. (TR #1 p. 1 - 2). A competency evaluation was performed on Ms. Mitchell and the Competency Hearing was held on April 1, 2011. (VT: 04/01/11). Although Ms. Mitchell was found by Dr. Sibley to be competent to pursue litigation, Dr. Sibley did find that Ms. Mitchell had major depression disorder which may be a mitigation factor. (Id. at 08:13:00; 08:13:30). Dr. Sibley went on to state that a major depression disorder would sometimes make it hard for people to even care for themselves. (Id. at 08:14:10).

On April 20, 2011, the court heard a motion of the Commonwealth to consolidate Ms. Mitchell's case with Monroe Circuit Court case 10-CR-00117, *Commonwealth v. Donna Bartley*. (TR #1 p. 65; VT: 04/20/11). The Commonwealth cited similarity of the evidence in its written motion as the sole reason for consolidating the two cases. (TR 1: 65). Over no objection, the trial court granted the motion to consolidate and set trial for September 12, 2011. (VT: 4/20/2011; 9:36:00-9:39:00).

The trial was held on September 12, 2011. (CD: 09/12/11; 09/13/11). The evidence was as follows:

Donna Bartley owned a trailer home on Mudlick Flippin Road in Monroe County. (CD: 09/12/11; 02:08:40). Appellant, Rita Mitchell, had been friends with Donna Bartley for 37 years and had lived with Donna and her family for approximately 17 years. (CD: 09/13/11; 02:09:45). Rita would help cook and take care of the kids. (Id. at 02:11:30). Rita helped raise Dusty and Destiny from the time they were born and took care of K.B. for most of his life. (Id. at 02:16:15). However, Rita was not comfortable disagreeing

with Donna because one time they had gotten into a disagreement and Donna pushed her down and smacked Rita. (Id. at 02:11:00).

On an application for food stamp benefits filed on June 11, 2010, Ms. Bartley stated that the members of her household included herself, her sons K.B. and Dusty and a daughter Destiny. (CD: 09/13/11: 01:19:24). Ms. Bartley was receiving monthly checks from RSDI (Retirement, Survivors and Disability Insurance) and SSI (Social Security Insurance) for K.B. and a check from RSDI for herself and Destiny for a total of \$1,777 a month. (Id. at 01:21:00; 01:28:20). The application did not include Appellant, Rita Mitchell, as living in the trailer. (Id. at 01:23:05).

Ms. Bartley started moving to Glasgow in April, 2010, and was completely moved out of the Monroe County home in August 2010. (CD: 09/12/11; 02:39:32; 02:49:33). Her home in Barren County was a tidy little home, neat and clean. (Id. at 02:49:45). Even though Donna was retired from being a home health caregiver and Rita did not have any special training for caring for people with special needs, Donna left Rita alone in Monroe County to take care of Donna's son, K.B.. (CD: 09/13/11; 02:09:00; 02:43:00; 02:50:25). After Donna moved out, she came back once or twice a week to bring food and water, 7 to 8 gallons a week, because there was no water inside the house. (Id. at 02:12:30; 02:27:00). Rita told Donna that the water needed to be turned back on but it was never done as Donna just said okay. (Id. at 02:13:00; 02:24:15).

Rita was also receiving a disability check every month for \$674, however, Donna would come and get that check and keep the money. (Id. at 02:15:15). Rita stated that Donna would use it to pay bills. (Id. at 02:22:40; 02:31:27). Donna had seen the shape the house had gotten in and she knew there was no trash pick-up at the trailer. (Id. at



02:32:35). Donna held a promise over Rita that she was going to move the trailer so Rita could take care of K.B. in Glasgow next to the house where Donna lived. (Id. at 02:35:30; 02:45:45; 02:46:00).

Jana Dubree, Office Manager at Monroe County Water District, testified that Ms. Bartley had an account and began water service at the trailer on Mudlick Flippin Road on May 3, 1995. (CD: 09/12/11; 01:42:33). A disconnect notice was mailed July 26, 2010, and service was disconnected on August 10, 2010, because Ms. Bartley quit paying on June 15, 2010. (Id. at 01:43:00; 01:45:10). Ms. Dubree stated that Ms. Bartley's bill averaged about \$15.00 per month. (Id. at 01:45:00).

In the summer of 2010, Eddie Proffitt was hired by a mortgage company to foreclose on the Bartley property. (Id. at 01:48:00). He was to go down to the property and take pictures once a week and report if anybody was living at the residence. (Id.). Mr. Proffitt visited the property approximately 10 times but was never able to get inside the house because of all the mean natured dogs that were around the house. (Id. at 01:48:35). Someone informed Mr. Proffitt that there was a boy living in that house which concerned him because of all the dogs living there and there was a foul odor coming from the house that he could smell 100 feet from the residence. (Id. at 01:49:30). Mr. Proffitt went and reported to Deputy Sherriff Billy Pickerell that a child was in the house. (Id. at 01:50:50; 01:55:45).

Deputy Pickerell and Deputy Joe Copuss responded to the complaint regarding small kids living at the residence with no water available. (Id. at 01:55:55). The deputies went to the door which was answered by Ms. Mitchell. (Id. at 01:56:35). When she opened the door, dogs started coming out. (Id. at 01:57:30). Ms. Mitchell appeared to

have dog feces on her feet and ankles when she answered the door. (Id. at 01:58:25; 02:02:05). When asked, Ms. Mitchell responded that there were no kids in the residence, that she was the only one there. (Id. at 01:57:00). Because of the dogs and the smell coming from inside the home, they decided to leave to get Social Services. (Id. at 01:57:30; 01:59:00). Deputy Pickerell testified that Ms. Mitchell smelled like the house. (Id. at 01:58:45).

Later, on the afternoon of October 20, Sheriff's deputies returned to the home with Social Services worker McShane Bartley, no relation to Donna. (Id. at 2:08:00). When McShane and the deputy arrived at the home, they were again met at the door by Rita Mitchell, who they asked for permission to enter. (Id. at 02:09:15 - 02:10:25). Ms. Mitchell responded that Donna had told her not to let anybody into the house. (Id. at 02:10:28). After initially refusing, Ms. Mitchell allowed them inside and they asked whether there were any children living in the home. (Id. at 2:10:25). Ms. Mitchell informed them that there were no children but that K.B. was in his bedroom in the back of the home. (Id. at 02:11:00). Unsure of how to proceed, McShane called Monroe County paramedics, who also responded to the scene. (Id. at 02:11:40). McShane, the deputy and the paramedics proceeded down the hallway of the home and came to K.B.'s door. (Id. at 02:12:35). McShane testified that the door was locked from the outside and that the knob would not turn but that he was able to push the door open. (Id. at 02:12:59). Inside they found K.B. in a deplorable and wholly unsanitary condition. (Id. at 02:17:50 - 02:19:00). Ms. Mitchell was living in the same conditions; she was filthy according to McShane. (Id. at 02:37:00). Outside the back door were two bog buckets full of feces and urine, apparently where Ms. Mitchell was using the bathroom. (Id. at 02:43:35).



K.B. was lying naked on his bed and largely covered in feces. (Id. at 02:23:15). His room was full of trash, mainly snack wrappers and soft drink cans. (Id. at 2:17:50 - 02:19:00). There was a large hole in his mattress which was lined with plastic, and the hole was full of a mixture of urine and feces. (Id. at 02:26:10). It was clear to the deputy and McShane that K.B. was hungry and thirsty, as he kept asking in one or two word sentences for “cookie” and “coke.” (Id.). The paramedics, unsure of how to remove K.B. from the home for medical treatment, called volunteer firefighters more experienced in responding to these types of unusual situations. (Id. at 02:20:40). The firefighters removed K.B., and he was transported by ambulance to the Monroe County Medical Center. (Id. at 02:20:40).

Michael Dubree, a detective with Kentucky State Police who arrived at the residence just prior to K.B. being transported, began taking photographs of the conditions where K.B. and Rita were living. (Id. at 03:18:28). Included in those photos, was the living area and couch where Ms. Mitchell slept and the bedroom where K.B. was located. (Id. at 03:22:20 – 03:23:00). Det. Dubree interviewed Ms. Mitchell at the residence. (Id. at 03:26:55). Ms. Mitchell stated that she lived there with K.B. and that Donna had moved out but did drop food by and would leave. (Id. at 03:27:29). Rita stated that she had depression and that she sometimes just did not feel like doing anything and that K.B. had been back there for a couple of weeks. (Id.). Det. Dubree could tell that K.B. had been back there a lot longer than a couple of weeks. (Id. at 03:29:00). Ms. Mitchell stated that the reason she did not pick up the phone and call somebody was because they were afraid they would lose him indicating to Det. Dubree that the state would take him.

(Id. at 03:56:40). After the interview, Det. Dubree arrested Rita Mitchell. (Id. at 03:33:20).

Det. Dubree then contacted Donna and asked her to meet him at the Monroe County Medical Center where K.B. had been taken. (Id. at 03:33:30). During the interview, Donna stated that she checked on K.B. two to three times a week, had been over at the residence the previous two Fridays to feed him and take him clean sheets and that K.B. was clean. (Id. at 03:34:30). Donna's youngest son, Dusty, was also interviewed at the hospital and said that they had been over there the previous couple of Fridays and that he had seen feces on K.B.. (Id. at 03:36:35). Dusty stated that he had told his mother that he didn't like K.B. having feces on him, that they needed to do something with K.B. and that he would gladly give up his bed if K.B. could come and live with them in Glasgow and that Donna just shrugged her shoulders and blew him off. (Id. at 03:54:00). According to Dusty, K.B. had been in that room for the last several years. (Id. at 03:55:45).

Donna was subsequently interviewed again that night at the Monroe County Jail (Id. at 03:36:30). Donna was arrested and after being confronted with Dusty's statement, Donna changed her story and admitted that the last time she was over there, she did see feces on K.B.. (Id. at 03:37:05; 03:39:30). Donna immediately began putting the blame on Ms. Mitchell and stated, "I'll just tell you, I'm not happy with the way that Rita was treating him." (Id. at 03:37:05).

At the hospital, a nursing staff of about 4, including Lori Petett, worked approximately an hour and a half scrubbing K.B. trying to clean him to get him into any kind of shape for the doctor to be able to check on him. (CD: 09/13/11; 09:08:00). K.B.

was begging for water and a cookie so they worked a long time to get the feces out of his mouth before they gave him any water. (Id. at 09:09:20). Ms. Petett stated that K.B.'s groin area was very raw, had some areas on his back that were red and irritated and the skin on his body was loose as if he had lost a lot of weight. (Id. at 09:10:25). Ms. Petett believed the sores on his skin were bedsores from lying in the bed and not being turned. (Id. at 09:20:30). The next time she saw K.B. in the ER, he was walking up and down the hallway and was saying a few words, and she never would have thought he would have gotten back into the shape he was in as he was ambulatory on his own meaning he could walk and move around. (Id. at 09:19:00).

Ms. Petett heard Donna say that she did not know how K.B. got this way, that the lady that was with him was supposed to be taking care of him, that she had hired somebody to take care of him. (Id. at 09:13:00). Donna asked Ms. Petett on several occasions, "What's going to happen, what's going to happen to me, what are they going to do with me?" Donna again was saying that she was with K.B. less than a week before and sat with him and fed him and that K.B. was fine but Ms. Petett did not believe her. (Id. at 09:15:05). Nurse Phyllis Reagan was also involved in the clean-up of K.B. and heard the remarks by Donna and got up and left the room angrily because she knew this did not happen in a week. (Id. at 09:33:20).

K.B. was treated at Monroe County Medical Center for about two weeks. (Id. at 10:05:00). Dr. Jerry Bean was K.B.'s treating physician. (Id. at 10:13:50; 10:17:05; 10:24:45). In the emergency room, Dr. Bean stated that K.B. still smelled bad, had fecal material in his teeth, his skin was stained on multiple areas due to having feces on the skin for a period of time, and he was very weak and had very little control or no control

over the lower extremities. (Id. at 10:15:00). Dr. Bean also noticed skin folds hanging from K.B.'s arms, buttocks, abdomen and waist which are typically an indication of weight loss. (Id. at 10:16:35). K.B. showed signs of dehydration. (Id. at 10:20:28). An x-ray showed K.B.'s clavicle had moved forward. (Id. at 10:23:30).

Dr. Bean testified that he believed K.B. was placed in a situation that might have caused him serious physical injury and a grave risk of death because the fecal matter in the teeth could lead to E. Coli and a bacterial infection of the blood stream could spread to other organs which could pose a very serious threat of death. (Id. at 10:29:20; 10:30:20). Dr. Bean stated that the malnutrition could have been caused by a complete deprivation of food or just being deprived of nutrition by eating a lot of the wrong types of food. (Id. at 10:42:00; 10:48:15). Dr. Bean also stated that K.B. showed clinical signs of cerebral palsy and that it was possible that the clavicle being out of position was something he would occasionally see with patients with a neurological disorder such as cerebral palsy. (Id. at 10:53:00; 10:55:00).

Dr. Bean did testify that K.B.'s current weight of 177 ½ pounds was a reasonable weight for K.B.'s height. (Id. at 10:45:25; 10:46:45). K.B. had weighed over 300 pounds in 1994 and 1995. (Id. at 02:19:15). K.B.'s vital signs, blood pressure, heart rate and temperature were normal throughout his hospital stay. (Id. at 11:07:00). Throughout his two weeks at the hospital, K.B. improved every day. (Id. at 11:16:30). When K.B. left the hospital, he was eating a regular diet and the discharge note said K.B. was doing very well. (Id. at 11:05:30; 11:15:25). Dr. Bean also concluded that people with severe depression, as Ms. Mitchell was diagnosed, can have trouble taking care of their basic

personal needs and have problems with motivating themselves to do anything. (Id. at 11:02:05).

K.B. was transferred to a nursing home in November after leaving the hospital. (Id. at 11:39:15). K.B. was sent to a specialist in Bowling Green to have all of his teeth pulled out. (Id. at 11:43:00). K.B. left the nursing home in July, 2011 and still had problems with incontinence. (Id. at 11:43:30; 11:45:00).

Rita Mitchell testified that she has been treated and suffered from depression for years and that at that time, her depression was the worst it had ever been. (Id. at 02:21:00). Ms. Mitchell admitted that she did not call for help because she was afraid the State would take K.B. out of the home and that would make Donna mad at her, that she was afraid of Donna and depended on Donna for her very existence. (Id. at 02:22:00). Rita stated she could not leave because she had nowhere else to go. (Id. at 02:45:05)

Donna did not testify and did not call any witnesses on her behalf. In the closing argument the attorneys for each co-defendant again argued that the other was responsible for K.B.'s condition. (CD: 9/13/11; 4:40:15-4:56:50), (CD: 9/13/11; 4:57:00-5:20:30). The jury returned guilty verdicts against both for Assault in the First Degree. Donna was convicted of Criminal Abuse in the First Degree and Rita Mitchell was convicted of Criminal Abuse in the Second Degree. (Id. at 06:47:05; TR 2: 196-199). The jury recommended twelve (12) years on the Assault and five (5) years on the Criminal Abuse 2<sup>nd</sup> to be run consecutively for a total of seventeen (17) years for Ms. Mitchell and a sentence of twenty (20) years on the Assault 1<sup>st</sup> and ten (10) years on the Criminal Abuse 1<sup>st</sup> to run consecutively for a total of thirty (30) years for Ms. Bartley. (Id. at 07:54:00; TR p. 200 – 204). The Judge followed the recommendation of the jury and sentenced

Ms. Mitchell to a combined sentence of seventeen (17) years. (CD: 10/19/11; TR #2 p. 209 - 212).

On appeal, the Appellant contended that Mitchell freely undertook a duty to care for K.B. and that she failed to discharge that assumed duty to K.B. (Opinion p. 10). Respondent argued, and the Court of Appeals found, “there must also be evidence that Mitchell not only voluntarily assumed the duty to care for K.B. but also that she ‘so secluded [K.B.]...as to prevent others from rendering aid.’ *West*, 935 S.W.2d at 317.” (Opinion p. 10).

Because the trial court erred by failing to grant a directed verdict as to the charge of Assault in the First Degree because Mitchell did not possess a legal duty to care for K.B., the Court of Appeals unanimously and correctly reversed the judgment. This Court granted the Commonwealth’s motion for discretionary review to Appellant’s question as to whether Rita Mitchell had a legal duty to K.B.

Any additional facts may be mentioned in the argument section below, as necessary.

## ARGUMENTS

### I.

#### **THE KENTUCKY COURT OF APPEALS CORRECTLY HELD THAT APPELLANT, RITA MITCHELL, DID NOT POSSESS A LEGAL DUTY TO CARE FOR K.B.**

##### **A. Appellant's argument on preservation is waived; however, the issue of duty was properly preserved for appellate review.**

Appellant argues the issue of whether she owed a duty to K.B. "is not sufficiently preserved for appellate consideration". (Appellant's brief p. 7 - 8). However, this is an issue not addressed or even discussed in Appellant's Motion for Discretionary Review and therefore not reviewable.

Even if the issue was reviewable, Appellant conceded in its original brief to the Court of Appeals that when Mitchell moved for directed verdict, she argued, among other things, there was no proof of a duty; however, the Commonwealth did not address the concept of duty nor did the trial judge address the matter when it overruled the motion for directed verdict. (Appellant's Court of Appeals<sup>1</sup> Brief p. 19). The Appellant argued and is now arguing that since there was no ruling on the issue of whether Mitchell owed a duty to K.B., the issue was simply not preserved for appellate review by the directed verdict motion. (Id.; Appellant's brief p. 7).

The argument is flawed. There was a ruling on the issue when Ms. Mitchell argued there was no proof of a duty in her directed verdict motion and the trial court ruled in denying the directed verdict. Directed verdict motions are often overruled without any discussion and it would be an absurd argument to state it's not preserved

---

<sup>1</sup> Appellant was the Appellee in the Court of Appeals, therefore, it was labeled as Appellee's brief p. 19 in the Court of Appeals.



because although properly presented to the trial court, the trial court did not lay out why the directed verdict was denied on every single argument. The purpose behind preservation is to apprise the appellate court of the arguments below and there is no argument the Appellee did not state the grounds in her motion for directed verdict.

**B. Rita Mitchell did not owe a duty to K.B.**

Under KRS 501.030, General Principles of Liability, a person is not guilty of a criminal offense unless:

- (1) He has engaged in conduct which includes a voluntary act **or the omission to perform a duty which the law imposes upon him** and which he is physically capable of performing; and
- (2) He has engaged in such conduct intentionally, knowingly, wantonly or recklessly as the law may require, with respect to each element of the offense, except that this requirement does not apply to any offense which imposes absolutely liability, as defined in KRS 501.0505.

The Kentucky Crime Commission/Legislative Research Council Commentary to KRS 501.030 provides further that, “The main purpose of this provision is to conform and codify several common law principles of universal acceptance. By requiring a voluntary act or failure to perform a legal duty, subsection (1) intends to remove from the field of criminal liability all social harms resulting from involuntary acts as well as those resulting from failures to perform moral, **yct non-legal duties.**” KRS 501.030.

It is uncontroverted here that the assault allegedly committed by Rita Mitchell was a crime of omission rather than commission. The Commonwealth concedes as much in its response to Ms. Mitchell’s motion for directed verdict. (CD: 9/13/11; 1:52:30-1:53:00). Further, KRS 501.030, recited *supra*, makes clear that a crime of omission can occur only when one fails to perform a duty which the law imposes upon him. KRS

501.030. It is well-settled that where the crime is one of omission, the legal duty required by KRS 501.030 becomes an element of the crime. *See West v. Commonwealth*, 935 S.W.2d 315, 317 (Ky.App.1996) (finding that where a criminal conviction was based on failure to provide adequate care to a disabled adult, “there must exist a legal duty owed by the defendants to the victim,” and “a finding of legal duty is a critical element of the crime charged”).

As stated in the Court of Appeals opinion, on appeal, the Commonwealth contended that Mitchell freely undertook a duty to care for K.B. and that she failed to discharge that assumed duty to K.B. (Opinion p. 10). Mitchell argued and the Court of Appeals found “there must also be evidence that Mitchell not only voluntarily assumed the duty to care for K.B. but also that she ‘so secluded [K.B.]...as to prevent others from rendering aid.’ *West*, 935 S.W.2d at 317.” (Opinion p. 10). The Appellant focuses on its argument that Ms. Mitchell provided ongoing care for [K.B.], in addition to two (2) other minors born of Donna, for seventeen (17) years prior to being charged. (Appellant’s brief p. 8). Appellant argues that the Court of Appeals erred when it perceived Mitchell as simply a bystander. (*Id.*). Appellant then spends the next two pages trying to demonstrate that Mitchell was not placed in the same situation as K.B. in that she had a cell phone to call someone or make new living arrangements for herself. (*Id.* at p. 9).

Although the Court of Appeals decision was based on *West v. Commonwealth*, Appellant argues that the Court of Appeals came to an opposite determination about whether the defendant possessed a legal duty of care to the victim. (Appellant’s brief p. 11). *West* stated the law, but what was distinguishable in *West* was that it involved a husband and wife who assumed the caretaking role of his sister. As stated by Appellant,

KRS 209.020(6) defines “Caretaker” as an individual or institution who has been entrusted with or who has the responsibility for the care of the adult **as a result of a family relationship**, or who has assumed the responsibility for the care of the adult person voluntarily, or by contract, employment, legal duty, or agreement. (Appellant’s brief p. 11) (Emphasis added). After the victim’s mother passed away, the Wests **accepted responsibility** for the victim’s care. (Emphasis added). The Wests became caretakers pursuant to KRS 209.020(6) based on accepting responsibility based on a family relationship. KRS 209.020(6) imposed on the Wests a duty to care for their sister based on the family relationship. There was no evidence in *West* that there was anybody else involved in the victim’s care. The Wests also so secluded the helpless person as to prevent others from rendering aid. That was not present in the case at bar; K.B.’s mother, Donna, still had the duty to care for K.B. Donna failed in that care when placing both K.B. and Ms. Mitchell in those deplorable conditions.

Appellant cites to *Staples v. Commonwealth*, 454 S.W.3d 803 (Ky. 2014), where a live-in boyfriend was found to have “actual custody” of the child and therefore had a legal duty to care for the child. (Appellant’s brief p. 12). However, Appellant left out, “To reiterate, ‘actual custody’ under the criminal abuse statutes includes a relationship between a nonparent and a child in which the nonparent resides indefinitely with the child in a parent-like role and assumes or shares a substantial responsibility for such necessities as food, shelter, and protection.” (*Id.* at p. 818). Rita Mitchell did not assume these responsibilities in that she could not provide them. She was completely reliant on Donna to provide these for both Rita and K.B. Contrary to Appellant’s assertion, Rita did not

have transportation, any money to provide any of the necessities, was scared of Donna and living in the same deplorable conditions.

In the case at bar, the Commonwealth did not produce any evidence to show Ms. Mitchell had a duty. Ms. Mitchell was living in the same deplorable conditions and was also covered in feces on her feet. Ms. Mitchell suffered from severe depression and was also a victim. Ms. Bartley was taking Rita's disability check to pay her bills but could not pay the \$15.00 per month to insure her son and Rita had water. Ms. Bartley knew Ms. Mitchell was estranged from her family and even played upon this and told Ms. Mitchell that her family did not care about her. Ms. Bartley held over Rita the promise that she was moving the trailer over next to her home although the trailer was being foreclosed on. Ms. Bartley never intended on moving Rita and K.B. to Glasgow even though Dusty told his mother that K.B. could have his bedroom. Even after all of this, Ms. Mitchell still tried to protect Ms. Bartley and defend against her abuse. Rita stated that she depended on Donna for her very existence and could not leave. By taking Rita's check and leaving Rita and K.B. at the trailer and being the only source of food and water, Donna became the caretaker of both Rita and K.B.

At the end of the Commonwealth's case, even taking the evidence in the light most favorable to the Commonwealth, the evidence only showed Rita was a victim as well. In fact, Ms. Bartley should have been charged with Assault on Ms. Mitchell as well. Rita had no training on home health care; however, Donna did and should have known the dangers of Rita and K.B. living in those conditions without any water source. The Commonwealth failed to prove Rita had a duty to K.B.. K.B. was not related to Rita and lived in the same deplorable conditions. The only evidence presented was that

Donna was using Rita, taking her money and K.B.'s money and left them in that house.

Donna even went so far as to tell Rita not to let anyone into the house.

### **Conclusion**

A conviction cannot stand if no reasonable juror could base a conviction on the evidence presented. In this case, there is no evidence that Rita had a duty of care for K.B. There was insufficient evidence to sustain a conviction for the offense of first degree assault or criminal abuse in the second degree. When all evidence is considered, it is clear Rita Mitchell was entitled to a directed verdict of acquittal. Presented with the scant and unreliable evidence inculcating Ms. Mitchell, no reasonable juror could find guilt beyond a reasonable doubt. This error violated Ms. Mitchell's constitutional rights under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and §§ 2 and 11 of the Kentucky Constitution. The Court of Appeals did not err when it found Rita did not have a duty of care for K.B. and Ms. Mitchell's conviction for first degree assault must be vacated.

## **II.**

### **THE COURT OF APPEALS WAS INCONSISTENT WHEN IT ONLY REVERSED ON APPELLEE'S CONVICTION FOR ASSAULT IN THE FIRST DEGREE.**

Appellant argues that "it is inconsistent for the Court of Appeals to affirm Appellee's conviction on Criminal Abuse in the Second Degree, which requires a finding that Appellee had actual custody of [K.B.], but then determine that Appellee should be granted a directed verdict on her Assault in the First Degree charge because she had no legal duty of care to [K.B.]" (Appellant's brief p. 14).

Appellee agrees that the Court of Appeals was inconsistent, that both charges should have been reversed. Mitchell argued that Directed Verdict on both charges should have been granted, however, the Court of Appeals failed to address the directed verdict on the Criminal Abuse in the Second Degree Charge. Mitchell decided not to request review of this issue because of the delay it would cause in her release, however, given that this Court granted discretionary review, Appellee agrees that the Court of Appeals erred and would request this Court to so find and reverse on both charges.

### **Conclusion**

For the reasons stated above, Ms. Mitchell respectfully requests her conviction and sentence be reversed, and this case be remanded to the Monroe Circuit Court with instructions to grant the appropriate relief.

Respectfully submitted,



ROY ALYETTE DURHAM II  
ASSISTANT PUBLIC ADVOCATE  
COUNSEL FOR APPELLANT  
RITA MITCHELL

